No. 98-44

In The

Supreme Court of the United States

October Term, 1997

GERALD GEE,

Petitioner,

vs.

FREDERICK HUMPHRIES, BISHOP HOLIFIELD, CARRIE GAVIN, NELLIE WOODRUFF, ROBERT ROLLINS, RICHARD HOGG, JAMES HEEKIN, JR., ELIZABETH LINDSAY, AUDREA ANDERSON, JULIAN BENNETT, JR., FRANK BROGAN, PAUL CEJAS, CHARLTON DANIEL, JR., PERLA HANTMAN, GWENDOLYN MCLIN, JON MOYLE, DENNIS ROSS, STEVEN UHLFELDER, WELCOM WATSON and CORNELIA SHA'RON JAMES,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS FREDERICK HUMPHRIES, BISHOP HOLIFIELD, CARRIE GAVIN, NELLIE WOODRUFF, ROBERT ROLLINS AND RICHARD HOGG

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QUESTIONS PRESENTED

The Respondents dispute the appropriateness of the questions presented by the Petitioner. The questions presented in this case are more accurately defined as follows:

1. Should the determination of the lower courts be disturbed, that the University appropriately disciplined an instructor for offending several students with a racial epithet (attributing a "nigger mentality" that keeps them on the "back of the bus forever") during a pre-class conversation.

2. Should the decision of the lower courts be disturbed, finding that an employee fails to bring a valid procedural due process claim in an instance where he was afforded adequate process and voluntarily bypassed, without good cause, numerous available internal and external administrative and judicial processes.

LIST OF PARTIES

The parties to the litigation are:

Plaintiff (Petitioner): GERALD GEE

Defendants (Respondents): FREDERICK HUMPHRIES, BISHOP HOLIFIELD, CARRIE GAVIN, NELLIE WOODRUFF, ROBERT ROLLINS, RICHARD HOGG, JAMES HEEKIN, JR., ELIZABETH LINDSAY, AUDREA ANDERSON, JULIAN BENNETT, JR., FRANK BROGAN, PAUL CEJAS, CHARLTON DANIEL, JR., PERLA HANTMAN, GWENDOLYN MCLIN, JON MOYLE, DENNIS ROSS, STEVEN UHLFELDER, WELCOM WATSON, and CORNELIA SHA'RON JAMES

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OPINION BELOW

The Opinion Below is a Per Curiam Affirmance by the United States Court of Appeals for the Eleventh Circuit.

The Petitioner voluntarily dismissed with prejudice his equal protection claim in federal court and thereafter pursued an unsuccessful lawsuit in state court arising out of these same facts. *Gee v. State of Florida Board of Regents*, Case No. 96-3741 (judgment for defendants), aff'd Case No. 97-03061 (Fla. 1st DCA 1998).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT LAWS

United States Constitution, Amendment I.

United States Constitution, Amendment XIV.

Florida Administrative Code § 6C3-10.125.

Provisions are set forth in Appendix D of the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This case concerns the propriety of the University imposing an eight day suspension on a faculty member for using an insulting racial slur to students. Petitioner, a public relations instructor, overheard two African American students complaining before class about his department's failure to provide them practical opportunities to use their public relations training. Petitioner responded that such complaint could be construed as a "nigger mentality" that keeps them on the "back of the bus forever." His purposes for using this speech were to insult the students as poorly motivated or too lazy to solve this problem; and to silence their complaining, which implicated his own inattention to this problem, so that class could begin. Instead of calming the students down, this insulting speech caused an extended controversy among students that impaired Petitioner's effectiveness as a teacher and

created doubts about his impartiality toward complaining students. Petitioner later acknowledged that some disciplinary action was appropriate for this mistake in judgment. He elected not to protest the suspension under available administrative or state law procedures. The lower courts found that this case presented no substantial constitutional issue of either academic free speech or procedural due process.

A. Petitioner's Employment History.

The Petitioner was employed by Florida A & M University in 1977 with the express understanding that he would attain his doctoral degree. (R6-171, Exh. A, p. 423; Exh. D, pp. 31, 42-5, 48, 135, 138).[1] After the passage of six years, the Petitioner had failed to attain his terminal degree and failed to meet the requirements for tenure. (Pp. 156-7, 204, 268-70, 383, 385, 423; Exh. D, pp. 31, 43-5, 48, 138; Exhs. 22, 23). The Petitioner was removed from the tenure track and allowed to continue to teach in the position of a contractual instructor. As such, he did not have a right of continuing employment beyond the term of his nine month contract.

In 1989, the Petitioner requested that he be allowed to resume the tenure track. His request was granted with the understanding that he remain an annual contract employee, with no expectation of continued employment, and that he would have to attain tenure within six years or reiinquish employment at the University. (Pp. 408, 481-2; Exh. D, pp. 88-9). The Petitioner neither attained his terminal degree nor demonstrated the performance required for tenure. (Pp. 408, 481-2; Exh. D, pp. 88-9). The Petitioner conceded that he was losing his enthusiasm for teaching and that an acrimonious divorce and other personal problems were seriously

1. In the summary judgment granted to the Defendants the facts were construed most favorably to Petitioner/Plaintiff, as they also were in the District Court. It is noteworthy, however, that the most relevant facts cannot be disputed since they were furnished in the Petitioner's own statements, writings, and explanations. Unless designated otherwise, all page references in this section will be to R6-171, Exhibit A, the sworn deposition testimony of the Petitioner and exhibits to the deposition.

affecting his productivity and attitude. (Pp. 156-7, 204, 215, 224-5, 268-70). His Dean urged that he seek medical and psychological assistance. (Pp. 56-7; Exh. 7; Exh. L). Gee exhibited a loss of weight, reported experimentation with drugs and complained how personal problems effected his work. (Exh. P).

As the Petitioner approached the deadline for consideration of his application for tenure, he was advised by Robert Ruggles, the Dean of the School of Journalism, Media and Graphic Arts and by his Division Director that his tenure chances were remote. (Pp. 95, 407; Exh. 22). The Petitioner was told that unless he had engaged in activities that had not yet been brought to the attention of the School (i.e., initiation of new programs or service and research in his area of expertise), he would not be considered as qualified for tenure. (Pp. 95, 408; Exh. 22). This admonition was critical as the Petitioner had not engaged in the type of service or research required for tenure and knew that he would not be able to supplement his credentials or accomplishments. (Pp. 95, 97-8). (Appendix A).

The Petitioner's poor prospects for tenure provoked him to engage in a campaign of antagonistic memoranda, blaming his lack of productivity and service upon his supervisors. (Appendix B). On September 20, 1993, a few hours prior to the start of class, the Petitioner authored an angry memorandum attacking the Dean and Division Director. (Appendix C).

Shortly thereafter, the Petitioner went to his class on Public Relations Class Studies. He arrived several minutes early and as he entered the classroom, overheard two or three students engaged in conversation. (Pp. 91-2, 103-4, 119, 126). The Petitioner did not focus upon the conversation and cannot recall the remarks being made by the students. (Pp. 104, 110). At one point he overheard two students, Marlon Flanigan and Derick Austin, express how they would like to participate in a student operated public relations office. This is the type of extra-curricula activity provided by the faculty of other disciplines. (Pp. 67, 105-8, 110-11, 113-19, 124, 128-9; Exh B, pp. 7-9). At no time did any of the students raise an issue involving race or race relations.

B. The Incident Triggering A Suspension.

As one of only two public relations faculty members, the Petitioner realized that Austin and Flanigan were voicing a concern that reflected upon his own lack of productivity and initiative and an echo of the evaluative criticism raised by the Dean and the Division Director. A few years earlier, Petitioner was involved in preliminary organizational efforts to form a student public relations office, but had allowed the project to die due to a lack of perseverance. (Pp. 61-67, Exh. 10). The Petitioner intended to stop the conversation between Flanigan and Austin and to begin class:

> A (Gee). I was concerned that most everybody had arrived now, and it was time to start taking up the material that we were supposed to do, because that class only met once a week for a semester. And so time was important to us.
>
> * * *
>
> Q I know, sir. But my question is this . . . did you want Mr. Flanigan and Mr. Austin's comments to cease and move on to something else?
>
> A Yes, yes. I wanted us now to move from that discussion into what we needed to talk about that night in terms of the course, the material.

(Pp. 111, 119, 126, 177-9).

He then stated:

> Now I'm going to say something which may upset some of you, because I'm going to use a term that I, myself, consider offensive. What I'm about to say is not directed at any of you, or all of you as a class, it's just something I want you to think about . . .
>
> What I want you to be aware of is that in this day and age, a person can't sit around waiting for someone to

> give them something. Anyone who doesn't take advantage of the opportunities that are there, or who doesn't make opportunities for themselves may be guilty of having what some would call a nigger mentality — the sort of thinking that can keep us all on the back of the bus forever.

(R1-23, ¶ 16; Pp. 126, 128-9, 133). (Exhibit D).

C. The Reaction to the Epithets.

The class reacted with shock, disbelief, and disappointment. (Pp. 110, 180-1, 184-5, 209; Exh. B, pp. 17,23). Students left the classroom while other placed their heads on their desks. (P. 180; Exh. B, p. 17). One student in the class, Chamane Kennedy reacted as follows:

> Are you looking at all our faces right now and realizing we're in shock? Can you please say something to let me know that you did not mean to offend myself and probably others. I raised my hand and I said, "I don't mean to be rude but you have offended me and you have probably offended other students in this class."

(R6-171, Exh. S; Exh. 40, interview of Chamane Kennedy, p. 4).

The Petitioner conceded that he has never heard Austin, Flanigan or any other person in attendance use the epithets "nigger" or "nigger mentality." Further, the Petitioner cannot identify the use of the epithet on campus in the context in which he used the word; namely serving to describe the audience and used to silence or to "motivate" the audience.

Although the remarks did not reflect the name of a particular student in the class who was purportedly exemplifying a "nigger mentality," the comments were directed at the two students who were expressing desires for a student-run public relations office; namely Austin and Flanigan. (Pp. 111, 128-9, 309). In testimony, the Petitioner conceded that he "doubted" that he would have

referred to "nigger mentality," had he not heard Flanigan's and Austin's remarks. (P. 133). In subsequent memoranda, the Petitioner described his intention as a response to the overheard conversation and, "to make a point in their own idiom, to *motivate*." (R6-171, Exh. 32).

It is clear that the Petitioner's use of the phrase "nigger mentality" was *not* a comment on race relations. The Petitioner unequivocally testified that he would have made the same statement in reference to Caucasians or to a group of Caucasians. (Pp. 133-134).

Furthermore, regarding the reference to the back of the bus, the Petitioner admits that neither he nor his ancestors were ever required to ride on the back of a bus or otherwise face oppressive racial discrimination. (Pp. 171-3). The Petitioner does recall riding segregated buses as a child and young man, but in those instances he rode at the front. (Pp. 171-2).

The students were so upset by these intemperate remarks that several authored a complaint delivered to the Division Director which stated in part:

> We feel his comment was derogatory, unethical and most importantly, inappropriate . . . To say the least, we are appalled and outraged that he could stand in front of our class and so blatantly disregard the fact that we as African-Americans are extremely sensitive to the use of racially derogatory terms of any kind. We find his action, in any context, not only racially charged, but extremely unprofessional.

(Exh. 29). Students were particularly offended by the Petitioner's reference to segregation. As one student, Lisa Atkinson, expressed:

> Offense does not begin to describe what I felt. First of all, he never said that he was about to make a racially derogatory statement that would attempt to lessen the struggles of the mind-set of an oppressed people. Nor did he state that he was about to offend my parents, grandparents, aunts, and uncles who for

> so many years rode the back of the bus, not because of their nigger-thinking, whatever that really means, but because of those in power who thought that Blacks were inferior and deserved nothing but inferior service.

(Exh. 24).

Upon observing the reaction of the listeners, the Petitioner realized that he had made a "grievous mistake" and admitted that the statement was racially charged and offensive. (P. 222; Exhs. 27, 32). Two days after the event, on September 22, 1993, the Petitioner was provided with a copy of the students' complaint. (Pp. 185-6, 188-9, 190, 255, 257; Exh. S, Gavin Depo., p. 211; Exh. 13). He acknowledged that the students were deeply hurt but appeared primarily concerned with his tenure application and his ongoing complaints about his supervisors. (Pp. 204, 206, 211; Exhs. 25, 28, 30, 31- p. 4). (Appendix E). He complained that he was badly treated by students for filing the complaint, attacked the students for not going to the "appropriate offices" to complain and questioned their motives. (Pp. 193-5, 206, 210-11, 256; Exhs. 25, 26, 31). (Appendix E). The Petitioner agreed to offer a written apology to the students in the hopes that it would "mollify the students and that no further action" would be necessary. (Exh. 25). (Appendix E, F, G, H).

After considering the student's reaction to his conduct, the Petitioner became convinced that his effectiveness as a teacher was "undermined" and that if he could so misjudge the reaction of an audience, he could no longer teach with confidence. (Pp. 204-6, 212, 247, 249, 250-1; Exhs. 22, 26, 27). He submitted his resignation and immediately began the process of transferring all teaching responsibilities and cleaning out his office. (Appendix E, F, G, H). Upon receipt of his resignation, the Dean and Division Director met with the Petitioner and persuaded him not to act in haste. He consented and resumed his class schedule. (Pp. 228; Exh. S; Exh. 18A).

D. The University's Response and Due Process.

The Dean of the School of Journalism, Media and Graphic Arts, inquired into the incident and recommended the imposition of disciplinary action. (Pp. 220, 279-80; Exh. D, pp. 66-7, 70-3, 91; Exh. G, pp. 47-9, 51, 55). The Petitioner has acknowledged that the Dean's recommendation for discipline was "reasonable" and "appropriate." (P. 281; Exh. 31-p.4).

Thereafter, an investigation was conducted by the Provost, Dr. Richard Hogg. (R6-171, Exh. E, pp. 72-3; Exh. G, pp. 47-9, 55, 59). Hogg spoke with the Petitioner, several students and conferred with the Dean regarding disciplinary action. (R6-171, Exh. G, pp. 47-9, 51, 56, 70-72, 79, 81-3, 85-6; Exh. S; Exh. 19). The Petitioner told Hogg that the students were to be blamed for the resulting disruption. Because of the potential for continuing disruption and a loss of confidence in his ability to teach fairly and without retaliation against the complainants, Hogg suggested that the Petitioner be temporarily replaced and disciplined. (R6-171, Exh. E, p. 74; Exh. G, pp. 99-101; Exh. S; Exh. 22). The Petitioner acknowledging the potential for continued disruption and suspicion of retaliation against students, arranged to have another faculty member grade the tests in his class as a safeguard against allegations of bias. (Pp. 294-5; Exh. 31, Grow Depo. p. 284).

Hogg's recommendations and the Dean's investigatory report were forwarded to the University President, Dr. Frederick Humphries, for action. Given that the Petitioner was on a non-tenured contract, the University was free to not renew his contract for the following year. The University decided to allow his contract to expire. (R6-171, Exh. E, pp. 74-8, 115, 119-20; Exh. G, pp. 100-1; Exh. S, p. 128; Exhs. 25, 28; Exh. C, p. 15).

Pursuant to the University's faculty collective bargaining agreement, the Petitioner was able to grieve any act of discipline or any decision regarding tenure through three grievance steps, culminating in a binding arbitration hearing before a neutral arbitrator. (Pp. 228-30; Exh. C, pp. 6-7; Exh. F, p. 54; Exh. T). Accordingly, the Petitioner, represented by an experienced Union representative, challenged the decision regarding his contract. (Pp.

230-8, 282, 284-8; Exh. C, pp. 10-13; Exh. T). In July 1994, the Board of Regents (BOR) at Step Two of the grievance process, reversed precedent and granted the grievance, directing the University's Equal Opportunity Programs (EOP) Office to investigate the Petitioner's conduct under the processes set forth at Rule 6C3-10.125, F.A.C. (Rule prohibiting discrimination and harassment.) (R6-171, Exh. C, p. 16; Exh. S; Exhs. 30, 30(a)).

In accordance with the resolution of the grievance, the EOP office investigated the students' complaint. This was not an investigation of new complaints, but rather an inquiry into the complaints provided by the students in September 1993. (R6-171, Exh. S, pp. 137-8; Exhs. 31-4; Exh E, pp. 156-7). The complainants expressed appreciation to the EOP office for its pursuit of their concerns. EOP Acting Director, Ms. Carrie Gavin, interviewed the students, reviewed a written response from the Petitioner dated September 2, 1994, and reviewed the contents of the file. (Pp. 298-9, 307; Exh. 32; Exh. S, pp. 137-8, 167, 169; Exhs. 31-4, 39, 40). Throughout the grievance process and EOP inquiry, the Petitioner never asserted that he was not forewarned his actions were prohibited by the anti-discrimination rule. Consistent with action taken in other instances where an employee has first violated Rule 6C3-10.125, F.A.C., Gavin recommended that the President impose a two (2) week suspension. (R6-171, Exh. S, Exh. 44).

Humphries notified the Petitioner that he was inclined to follow the Gavin recommendation and advised him that he could seek a review by the University Personnel Committee (UPC). (R6-171, Exh. S; Exh. 45). The UPC is comprised of three members of the administration and serves as an internal, predetermination sounding board. If unsuccessful before the UPC, the Petitioner could appeal to Humphries the proposed action and thereafter, if unsuccessful, could challenge any disciplinary action taken in a formal state administrative hearing or grieve the matter through binding arbitration pursuant to the collective bargaining agreement. (P. 303).

On November 22, 1994, the Petitioner requested and received a predetermination conference before the UPC. (Pp. 315-18; Exh.

H, pp. 34-6). The Petitioner was represented by legal counsel and was allowed to submit written and oral argument in response to the charges and to call witnesses. (R6-171, Exh. F, pp. 79-80, 99-100). Given that confidential complaints filed by students were to be discussed, observers were excused from the meeting. (R6-171, Exh. C, p. 54; Exh. F, pp. 95-6, 98). The UPC concurred with the EOP recommendation and forwarded its suggestion to the President for a final determination as to the action to be taken. (R6-171, Exh. E; Exh. 57; Exh. H, pp. 44-5).

Humphries met and discussed the charges with the Petitioner. Humphries concluded that some disciplinary action was appropriate and elected to proceed with a two (2) week suspension. (R6-171, Exh. E, p. 214; Exhs. 45, 58, 60). The Petitioner had several procedural avenues to appeal the suspension, including petitioning for a formal hearing pursuant to Section 120.57(1), Fla Stat. (1995), or processing a collective bargaining grievance through binding arbitration. Although represented by counsel and a Union official, the Petitioner did not seek a hearing in the state forum nor did he file a grievance. (P. 315; Exh. C, pp. 33-4, 47-8). (Exhibit I).

The Petitioner began his suspension in January 1995. On January 25, 1995, the District Court heard and denied the Petitioner's request for a temporary injunction. (R1-16). The Court set a hearing date to consider a permanent injunction, but, prior to the hearing date, the University voluntarily abbreviated the suspension action and resolved any pending issue for the purposes of an injunction action.

E. Use of Gee's Epithet On the University Campus.

There is no evidence in the instant record to indicate that any faculty member, employee, or student of the University used the epithet "nigger" or "nigger mentality" in a manner similar to the Petitioner. The suggestion by the Petitioner that racial epithets are routinely tolerated in conversation at the University is unsupported by the record. The Petitioner admits to never having heard the phrase "nigger mentality" spoken on campus prior to or after his

use of the phrase and cannot identify a single instance of the use of a racial epithet by any member of his September 20, 1993 audience.

The Petitioner concedes that his use of "nigger mentality" is unique, but relies upon scant anecdotal evidence to indicate that on rare occasion and in the appropriate pedagogical context, a racial epithet may have been read or spoken on campus. Rather than provide support for the Petitioner, this evidence reflects that the faculty understands the distinction between using these terms in some pedagogical context as opposed to its use as an insult. When used in its appropriate pedagogical context, the phrase may be acceptable, but when used in casual conversation to offend and silence student expression, it is not.

Moreover, the Petitioner's assertions regarding the occasional use of slurs on campus are irrelevant to the determination of this case. There is no evidence to indicate that any Respondent was aware of the purported usage of racial epithets on campus. The Petitioner raises this apparently irrelevant argument and then suggests that it was not the Petitioner's use of the word "nigger" that triggered the suspension.

It was the Petitioner's *insulting* and *offensive* reference to certain individuals having a "nigger mentality" that would keep them on the "back of the bus," that triggered the suspension. There was no legitimate pedagogical purpose for the Petitioner's speech, thus, the issue of whether the phrase would be tolerated in some other context is not relevant.

REASONS FOR DENYING THE WRIT

This case concerns the appropriateness of a disciplinary suspension given to an instructor for having used an offensive racial slur during a pre-class conversation with a few students. Contrary to the exaggerated gloss placed upon this case by the Petitioner, it does not implicate issues of academic freedom or free speech in the classroom. The Petitioner has conceded that his comments were a "mistake," that some disciplinary action was "reasonable," and that he does not intend to use the phrase "nigger mentality" in the future. Consequently, there appears to be no

lingering concerns involving the First Amendment. When this Court addresses an issue of free speech, it must be in the context of a clearly defined and meaningful dispute. This is not the case here.

The Petitioner has disavowed his remarks and has professed that he does not wish to use in the future the phrase "nigger mentality" that keeps some on the "back of the bus forever." Therefore, there is no chilling of his speech. The speech occurred prior to class and outside of an academic exercise. It is for all intents and purpose not a free speech case at all. There is no issue in this case regarding what forms of speech may be regulated during a classroom lesson.

The Petitioner has acknowledged that some discipline was "reasonable." There is no dispute that the epithet used by the Petitioner during a pre-class conversation offended and distracted students from their educational mission and was a serious misjudgment of his audience. Thus, this case turns upon the appropriateness of the degree of discipline (a suspension or a written reprimand) rather than the appropriateness of *any* discipline. The Petitioner could have, and should have, resolved this matter as a collective bargaining grievance.

The University provides a setting free from the distractions of racially offensive conduct and harassment. Rather than provide effective instruction, the Petitioner offended the constituent students who pay to attend and to learn.

Shortly after making his remarks, the Petitioner submitted his own resignation in recognition that his effectiveness as an instructor was lost. Considering that the Petitioner felt that his conduct warranted his final separation from his teaching position, the suspension action on appeal represents a lesser form of a discipline than what the Petitioner would have self-imposed.

Alternatively, the Petitioner raises an issue regarding the granting of summary judgment against his procedural due process claim. The record is clear that the Petitioner was fully afforded a plethora of due process to challenge his suspension. The Petitioner had access to several avenues of procedures within the State

University System, including a grievance procedure culminating in a neutral arbitration or an administrative proceeding before a neutral judge with the right of appeal through the Courts of Florida. He also enjoyed several state judicial avenues of relief, including the Florida Arbitration Code, Chapter 682, Fla. Stat. and, the right to appeal the University's Final Order to the Florida District Courts of Appeal. See Section 120.68, Fla. Stat. In spite of having legal and union representation, the Petitioner abandoned these processes and elected to proceed directly to the United States District Court with his free speech claims. In doing so, the Petitioner prematurely bypassed the University's own grievance system without explanation and without just cause. The Petitioner did not proceed to a final decision of the State University System before commencing his action in federal court. Although the Petitioner may proceed in federal forum with a First Amendment claim, he cannot ignore the processes available to him, and then complain that procedural due process was inadequate.

The courts below correctly determined that the Petitioner should not be permitted to prematurely and without cause simply ignore internal processes for the redress of grievances, and thereafter attack the system for a purported failure to provide such process.

A. This case does not implicate questions of the First Amendment and classroom speech.

The Petitioner urges the Court to consider this case for the purposes of clarifying the balance of academic freedom and the right of the employer to prevent racial insults against students. The facts of this case fail to raise the issue as framed by the Petition. The Petitioner was not involved in a classroom exercise, pedagogical speech or an expression of learning when he spoke of the "nigger mentality" that was responsible for keeping the listeners on the "back of the bus forever." These comments were made during a conversation conducted prior to class, in response to the comments of two students. By interjecting his statements into their conversation, the Petitioner was *not* attempting to teach his course or otherwise carry out an academic activity. He described his purpose as an effort to motivate the listener (to initiate a extra-

curriculum activity) and to silence a conversation between students so class could begin.

Given that the Petitioner's comments were made in a pre-class conversation and not in the context of a classroom lesson, the reasoning set forth in *Connick v. Myers*, 461 U.S. 139 (1992), applies. The protection of speech by a public employee should not be elevated simply because the place of employment is a school. *See Pickering v. Board of Education of Township High School District*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968); *Waters v. Churchill*, 511 U.S. 661, 128 L. Ed. 2d 684, 114 S. Ct. 1878 (1994). Nor do public employees enjoy a higher standard of protection for speech because they are at *other times* engaged in pedagogical conduct. The Petitioner's remarks were made prior to the commencement of class and unrelated to the course content. The coincidence that the conversation occurred while the Petitioner and a few students were waiting for the commencement of class does not render the conduct a pedagogical exercise.

The Petitioner's remarks are accurately characterized as speech, by an educator, made outside of a pedagogical context. This Court has clearly recognized the applicability of the "public concern" test to the speech of educators conversing outside of the conduct of their course. *See Pickering v. Board of Education*, 391 U.S. 563 (1968). The circuits do not require guidance on this issue. The *Pickering* decision and its progeny have served well for three decades.

B. There is no conflict in the circuits regarding the application of the public concern test.

There is no conflict among the circuits regarding the application of the public concern test to the speech of educators. The circuits have consistently applied the principles of *Pickering v. Board of Education* and *Connick v. Myers* to First Amendment cases arising in an educational context. Specifically, the First, Sixth and Tenth Circuits have applied the Pickering Balancing test to an educator's First Amendment free speech claim. *See McDonough v. Trustees of the University System of New Hampshire*, 704 F.2d 780 (1st Cir. 1983) (applied *Pickering* "public concern" test to

situation where college professor was terminated for espousing his views that capitalists exploit others); *Alivoni v. Worcester School Committee*, 777 F.2d 776 (1st Cir. 1985) (applied *Connick* and the "public concern" test to situation where teacher was disciplined for classroom-related speech); *Gardetto v. Mason*, 100 F.3d 803 (10th Cir. 1996) (applied *Connick* and the "public concern" test to situation where public school employee was suspended for making comments); *Schiller v. Moore*, 30 F.3d 1281 (10th Cir. 1994) (applied *Pickering* "public concern" test to situation where public school employee resigned after making comments regarding Board policy); *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th Cir. 1995) (applied *Pickering* "public concern" test to facts similar to instant matter where public school employee — basketball coach — was discharged for making comments about the need for more "niggers").

Moreover, the Second, Fourth, Fifth, Ninth and Eleventh Circuits have similarly applied the *Pickering* balancing test. *See Blum v. Schlegel*, 18 F.3d 1005 (2d Cir. 1994) (discussed infra); *Boring v. The Buncombe County Board of Education*, 136 F.3d 364 (4th Cir. 1998) (applied *Pickering* and *Hazelwood*, cited infra, to a situation where teacher's speech involved curriculum-related matters); *Martin v. Parrish*, 805 F.2d 583 (5th Cir. 1986); *Ferrara v. Mills*, 781 F.2d 1508 (11th Cir. 1986); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991); and *Brewster v. The Board of Education of Lynwood Unified School District*, 1998 U.S. App. LEXIS 12768 (9th Cir. 1998) (applied *Pickering* to situation where public school teacher was disciplined partly for reporting errors regarding school attendance records). It is clear that the circuits are not split.

The Petitioner erroneously suggests the existence of conflict between the decisions of the First Circuit citing *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993), and the court below.[2] The test articulated in *Ward v. Hickey* requires that classroom speech is not

2. The decision of the Eleventh Circuit below was a per curiam affirmance and therefore there is no conflict between the instant case and the reasoning of the Court in *Ward v. Hickey*.

protected, unless it has a "legitimate pedagogic concern." The First Circuit's use of the "legitimate pedagogic concern" test is essentially identical in application to the use of the test of "public concern" test articulated by other circuits including the Eleventh Circuit. Under *Ward v. Hickey*, an instructor that insults or offends individuals with inappropriate racial invective during a pre-class conversation, does not engage in a legitimate pedagogical concern nor does it reflect a matter of "public concern." Thus, there is no conflict among the circuits for the purposes of this case.

C. The Petitioner was on fair notice regarding the inappropriateness of his conduct.

The Petitioner is an instructor in the field of public relations. He was provided with a clearly drafted rule prohibiting sexual and racial harassment. Thereafter, he received training on the application of the rule and authored a memorandum indicating his understanding of the need to avoid discriminatory conduct.

The Petitioner was aware that he was violating the rule when he directed an offensive racial slur at students Austin and Flanigan, and others within earshot. It is beyond cavil that to attribute to a person a "nigger mentality" is the most opprobrious of slurs. In fact, the Petitioner prefaced his remarks with the revelation that he was about to use language offensive to the listeners.

The University, as an employer, has the authority, and indeed the obligation to promulgate rules identifying the parameters of acceptable conduct. *Connick v. Myers, supra. Waters v. Churchill,* 511 U.S. 661, 114 S. Ct. 1878 (1994). The University's rule prohibiting discriminatory acts is well crafted so as to preserve the academic experience in an atmosphere free of distracting or demeaning discriminatory conduct. *Grayned v. City of Rockford,* 408 U.S. 104 (1972). University instructors must be responsible for the likely application of a rule to their conduct. "Common sense, reason and good judgment should have made him cognizant of the fact that his conduct could be cause for {discipline}" and that he "understood both the standards to which he was being held and the circumstance of his conduct." *Korf v. Ball State University,* 727 F. 2d 1222, 1227-8 (7th Cir. 1984). The instant

rule does no offense to academic freedom, but rather furthers the goals of the University.

> Racial slurs more profoundly burden the striving toward educational attainments of their victims than do noise or inane sales patter . . . Racial insults obviously burden the ability of targets to pursue their studies; infuriated and embarrassed, their emotions may push them toward self-protection or retaliation. The University should have an obligation to protect its students from such disabling harassment.

J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 Georgetown L.J. 399, 420.

To accept the Petitioner's argument that he should escape any corrective action because the rule is vague, would invalidate any policy prohibiting racial or sexually offensive conduct or harassment. If the instant rule does not squarely apply to the Petitioner's conduct, then no rule could ever be fashioned that would require the Petitioner to accept some responsibility for his offensive remarks. The Petitioner's proposed limitation upon an employer's ability to take remedial action because of a "vague" rule is contrary to this Court's instruction that an employer is obligated to prevent and correct promptly any discriminatory harassing behavior. *Faragher v. City of Boca Raton*, 118 S. Ct. 2775, 141 L. Ed. 2d 662 (1989).

The Petitioner also argues that, before the employer may take corrective action, the discrimination must be severe and pervasive citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). This argument confuses the standard for establishing the employer's liability under Title VII with the obligation of an employer to take remedial action in response to an employee's harassing or offensive racial or sexual conduct. Contrary to Petitioner's argument, the obligation of the employer is to take appropriate corrective action upon *every* instance of improper offensive racial or sexual harassment. *Faragher, infra.*

The Petitioner's reliance upon *Cohen v. San Bernardino Valley College*, 92 F.3d 968 (9th Cir. 1996), is misplaced as the narrow decision in that case turned upon a unique set of facts not applicable here. For many years, the instructor in *Cohen* utilized an unusual teaching style and lecture content with the approval of his supervisors. Without explanation, his teaching was deemed in violation of a pre-existing anti-harassment rule. The court noted that the University had permitted the instructor to teach in this manner for years without a finding that this conduct was in violation of the rule. The court was critical of the change in enforcement and the inconsistent interpretation of the rule. In *Cohen*, the court did not intend to render a broad observation regarding the promulgation of rules restricting racially offensive slurs.

> We do not decide whether the College could punish speech of this nature if the Policy were more precisely construed by authoritative interpretive guidelines or if the College were to adopt a clearer and more precise policy.

(*Cohen*, at page 971).

Distinguishing the instant case from *Cohen*, the Respondent's rule prohibiting discrimination is applied and enforced in a consistent manner. The Petitioner does not assert that his use of a racial epithet was ever condoned by the University.

Furthermore, even in the absence of a rule, the University is free to take corrective measures when an employee offends others with the use of a racial epithet. The District Court held:

> Mr. Gee also asserts that FAMU's rule against discrimination and harassment, which FAMU cited as grounds for his suspension, is vague. But a university, like any other public employer, need not have a comprehensive code of conduct to govern its employees; public employees may be disciplined for good cause even without a specific written rule prohibiting the conduct at issue. It should have been obvious to Mr. Gee, from either a reading of the

> rule at issue or just as a matter of plain common sense unrelated to any written rule, that this kind of racially derogatory remark could and reasonably would result in corrective or disciplinary action. Mr. Gee could not possibly have thought he was free to direct this kind of remark at his students with impunity.

That court's holding has been mirrored by this Court ("While proof that an employer had promulgated an anti-harassment policy with complaint procedure is not necessary in every instance as a matter of law, ..." *Faragher* at 1998 U.S. LEXIS 4216, p. 4). Also see *Ward v. Hickey, supra*, 996 F.2d at 454 (". . . we do not hold that a school must expressly prohibit every imaginable inappropriate conduct by teachers.").

D. There is no conflict among the circuits regarding the application of the balancing test.

The Petitioner suggests that the circuits are in need of guidance regarding which balancing test should be used to analyze the regulation of speech in the classroom. (Comparing *Pickering* with *Hazelwood*). Contrary to this assertion, a review of the decisions cited in the Petition reflects that the circuits have uniformly balanced the interests of the public employer and public employee regarding free speech using *Pickering* and *Hazelwood*. *Hazelwood* is not inconsistent with *Pickering*, but rather reflects an application of the principles of *Pickering* to classroom speech.

All of the cases on the balancing of free speech interests, cited by the Petitioner, emanate from the same court decisions and reflect a common reasoning. The seminal case *Pickering*, calls for

> a balance of the interest of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering, 391 U.S. at 568.

Hazelwood School District et al. v. Kuhlmeier, 484 U.S. 260 (1988) and its progeny, including *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991), draw upon the *Pickering* balancing principles, and discusses speech in the educational setting. These cases extend the *Pickering* "public concern" test to recognize that a:

> state's regulation of speech in a public school setting is often justified by peculiar responsibility in providing educational services to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity and that the views of the individual speaker are not erroneously attributed to the school.

Miles, 944 F.2d at 777, quoting *Hazelwood*, 484 U.S. at 271.

Furthermore, it is not clear as to why the instant Petitioner, having failed the *Pickering* balancing test, would complain about not receiving consideration under the more onerous *Hazelwood* analysis. The instant Petitioner failed to meet the broad "public concern" test articulated by *Pickering* and its progeny. Thus, he could not pass the legitimate pedagogical concern test referenced in *Hazelwood*. The Petitioner's speech would not be protected under *Pickering, Connick, Hazelwood, or Miles.* In any event, since the Petitioner's remarks did not constitute pedagogical speech, it does not implicate *Hazelwood* or *Miles*.

E. There is no conflict among the circuits regarding the exhaustion of state judicial remedies prior to bringing a procedural due process claim.

The decision of the Eleventh Circuit below is a per curiam affirmance. The Petitioner does not seek to identify a conflict between this case decision and other circuits, but argues that there is a split between a different case, *McKinney v. Pate*, and other circuits. In addition, the fact that the lower court issued a per curiam affirmance without an opinion leaves this Court without an opinion as to the legal issues which formed a basis of the lower court's

holding. In such a case, this Court has normally declined to exercise review. *NLRB v. Sears Roebuck & Co.*, 421 U.S. 132, 44 L. Ed. 2d 29 (1975); *Ramsey v. United Mine Workers*, 401 U.S. 302, 28 L. Ed. 2d 64 (1971); *Adickes v. Kress & Co.*, 398 U.S. 144, 26 L. Ed. 2d 142 (1969). Therefore, the instant case does not provide an appropriate basis for certiorari review.

1. *Petition for Writ of Certiorari Previously Denied Regarding McKinney.*

The Petitioner asserts that the decision reached by an en banc panel of the Eleventh Circuit Court of Appeals in *McKinney v. Pate*, 20 F.3d 1550 (11th Cir. 1994) (en banc), *cert. denied*, 513 U.S. 1110 (1995), should be reversed. As the citation indicates, however, this Court previously had the opportunity to review the decision in *McKinney*, and declined certiorari review. Nothing has transpired since this Court's decision to deny certiorari in *McKinney* that would warrant a revisitation of that case.

2. *Facts Of Instant Case Inappropriate For Review.*

In any event, the issue which the Petitioner is asking this Court to address is whether he should have been required to exhaust all of his state judicial remedies before bringing a federal cause of action for procedural due process violations. In reviewing the facts of the instant case, the Court will find that this is clearly not the appropriate situation for reviewing an issue of this magnitude.

The Petitioner received full pre-suspension due process including:

- notice of complaints;
- right to file position statement with EOP investigator;
- legal and union representation;
- appearance before the UPC with witnesses to respond to the charges; and
- meeting with the University President to respond to the charges.

Thereafter, he enjoyed the right to appeal the suspension under Section 120.57, Fla. Stat., and obtain an administrative hearing with full disclosure of all charges and adverse evidence, discovery, subpoena authority and legal representation. The Petitioner elected not to seek such a hearing. In the event the Petitioner had desired, he could have alternatively sought binding neutral arbitration under the collective bargaining agreement. Such arbitration would have allowed him a full evidentiary hearing with subpoena authority and legal representation.

Throughout this case, the Petitioner has suggested that he was unable to grieve the President's decision to suspend under Rule 6C3-10.125, F.A.C. The Petitioner's brief reflects a misinterpretation of the rule. The Petitioner enjoyed the right to appeal his suspension under processes provided pursuant to the Administrative Procedures Act, culminating in a Final Order by the University which is appealable to the District Court of Appeals. Alternatively, he could have grieved the suspension under the collective bargaining agreement through two steps to binding neutral arbitration. There must be an election of these remedies. The provision of Rule 6C3-10.125(8)(b), F.A.C., merely prevents the appeal to the President after initiation of other litigation.

In any event, it is undisputed that the instant Petitioner elected *not* to grieve his suspension or to seek an administrative hearing. Rather, he abandoned the available processes and filed directly in a federal forum. There is no indication in the record to suggest that the grievance or the administrative hearing would have been futile. The Petitioner cannot explain why he simply abandoned these quick and fair processes. In fact, the Petitioner's union representative, Dr. Tucker, opined that he believes the Petitioner would have sustained his grievance, had one been filed. The Petitioner not only declined to exhaust his state judicial remedies before bringing his federal cause of action, but also failed to exhaust all of the internal remedies provided to him by the University.

The seminal cases in the area of procedural due process have generally involved a plaintiff who had availed himself of

the means provided to him, and therefore had "clean hands" in claiming a denial of due process. The Petitioner in the instant case, however, failed to even pursue the "in house" remedies which were available to him.

3. *McKinney Not In Conflict With Other Circuits.*

Assuming, however, that this Court does not deny the petition on the above grounds, the Respondents contend that the Petitioner's arguments are flawed for a number of additional reasons. Therefore, the petition for a writ of certiorari should be denied for the following reasons as well.

First, the Petitioner has mischaracterized the Eleventh Circuit's decision in *McKinney*. According to the Petitioner's interpretation, the Eleventh Circuit relied exclusively upon *Parratt v. Taylor*, 451 U.S. 527 (1981), in rendering its decision in *McKinney*. Petitioner also contends that *McKinney* conflicts with virtually every other circuit in failing to limit *Parratt* to cases where the conduct in question is truly "random" and "unauthorized." Furthermore, Petitioner offers the cases of *Harris v. Bd. of Ed. of City of Atlanta*, 105 F.3d 591 (11th Cir. 1997); *Bell v. City of Demopolis*, 86 F.3d 191 (11th Cir. 1996), and *Tinney v. Shores*, 77 F.3d 378 (11th Cir. 1996), for the proposition that the Eleventh Circuit has extended *McKinney* to mean that post-termination procedures must be used regardless as to why the initial procedures were inadequate and regardless as to the authority under which the actions were performed.

As an initial matter, the Petitioner's interpretations of *Harris*, *Bell* and *Tinney*, though creative, are nonetheless inaccurate. In *Harris*, the Eleventh Circuit did absolutely nothing to expand the meaning of *McKinney* or the requirements of post-deprivation process. Instead, the court simply stated that it did not need to decide the issue of procedural due process in order to rule on the pending claim of qualified immunity. *Harris*, 105 F.3d at 596. Similarly, in *Bell* the Eleventh Circuit merely restated its holding in *McKinney* and acknowledged that the state of Alabama offered adequate remedies in the form of administrative and state court review. *Bell*, 86 F.3d at 192. Finally, in *Tinney* the Eleventh Circuit

stated that because the plaintiffs had failed to challenge the adequacy of Alabama's post-deprivation remedies, the court had no occasion to decide whether Alabama law in fact provided adequate remedies for relief. *Tinney*, 77 F.3d at 382. Therefore, a more accurate reading of these cases indicates that *McKinney* and its progeny have not expanded the realm of post-deprivation procedures nearly as much as the Petitioner would have this Court believe.

In addition, the Petitioner falsely characterizes *McKinney* as standing for the proposition that a plaintiff must "exhaust" his state remedies before pursuing federal relief for procedural due process claims. The Eleventh Circuit, however, specifically rejected this argument as a basis for its ruling by explicitly stating in its decision:

> McKinney's case fails, therefore, not for want of exhaustion; indeed, *exhaustion is irrelevant to our decision and finds no mention in the opinion.* Rather, McKinney's case fails because he fails to state a procedural due process claim under *Parratt* and its progeny that would give rise to a section 1983 suit.

Id. at 1564. (Emphasis supplied). Therefore, Petitioner's argument that *McKinney* stands for this proposition is utterly misplaced and totally unsupported by the decision itself.

The remainder of Petitioner's argument revolves around the claim that the Eleventh Circuit's interpretation of *Parratt* "conflicts with virtually every other circuit." (Petitioner's Brief, pp. 24-25.) In support of this argument, the Petitioner cites to a number of cases which he claims stand for this proposition.

The cases cited by the Petitioner in his brief, however, do not conflict with *McKinney* for a number of reasons. First, most of the decisions cited to by the Petitioner were decided prior to this Court originally denying certiorari of *McKinney* in 1995. These cases include *Cotnoir v. University of Maine System*, 35 F.3d 6 (1st Cir. 1994), and *Kercado-Melendez v. Aponte-Roque*, 829 F.2d 255, 263 (1st Cir. 1987), *cert. denied*, 486 U.S. 1044 (1988); *Dwyer v.*

Regan, 777 F.2d 825 (2d Cir. 1985); *Stana v. School District of City of Pittsburgh*, 775 F.2d 122 (3d Cir. 1985); *Plumer v. Maryland*, 915 F.2d 927, 928-29 (4th Cir. 1991); *Cushing v. City of Chicago*, 3 F.3d 1156 (7th Cir. 1993), and *Easter House v. Felder*, 910 F.2d 1387 (7th Cir. 1990); *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985); and *Winters v. Board of County Commissioners of Osage County*, 4 F.3d 848 (10th Cir. 1993).

As previously referenced, this Court was presented with a petition for writ of certiorari regarding *McKinney* in 1994. At that time, each of the decisions referenced above had been rendered and were available to this Court for its review. If this Court had determined that a conflict existed between them and the decision in *McKinney*, this Court would have no doubt granted the writ for certiorari at that time. This Court, however, declined to do so and obviously determined that no such conflict existed between the decisions. Therefore, these cases cannot serve as a basis for Petitioner's claim of a conflict between the circuits on the issues addressed in the instant case.

This lack of a conflict is further reinforced by the fact that since the decision in McKinney and this Court's decision to decline certiorari review of *McKinney*, the courts within the circuits cited above have either rendered decisions relying on *McKinney* or citing favorably to *McKinney* as controlling authority or have failed to address the issues raised in *McKinney*, apparently agreeing by their silence with its reasoning. For instance, in *McDaniels v. Flick*, 59 F.3d 446 (3d Cir. 1995), *cert. denied*, 134 L. Ed. 2d 97, 116 S. Ct. 1017 (1996), the Third District Court relied heavily upon *McKinney* and other cases following its line of reasoning and held:

> *We find these cases convincing*. First, as the Supreme Court has held, [t]he constitutional [procedural due process] violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. *Zinermon v. Burch*, 494 U.S. 113, 126, 110 S. Ct. 975 (1990) . . . *We also find most*

> *persuasive the application of Parratt v. Taylor*, 451 U.S. at 527, 101 S.Ct. 1908, to claims that pre-termination decision makers were not impartial . . .

Id. at 460. (Emphasis supplied). *See also Dykes v. Southeastern Pa. Trans. Auth.*, 68 F.3d 1564 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1434 (1996); *Barkauskie v. Indian River School District*, 951 F. Supp. 519 (D. Del. 1996) (citing to *McKinney* and holding that no violation until state refuses to provide due process); *Myers v. Town of Landis*, 957 F. Supp. 762 (M.D. N.C. 1996) (court within Fourth Circuit which relied heavily upon *McKinney* in reaching its decision); *Roe v. Antle*, 964 F. Supp. 1522, 1531-1533 (D. N.M. 1997) (court within Tenth Circuit which described *McKinney* as "Instructive" and "persuasive").

As for the remaining circuits, the Petitioner has likewise misapplied the holdings in these circuits to fit his purposes. As for the Fifth Circuit's holding in *Brooks v. George County*, 84 F.3d 157 (5th Cir. 1996), that court simply held that actions in accordance with an official policy should not be labeled as "random and unauthorized" under *Parratt*. In its holding, that court made absolutely no mention of the decision in *McKinney* or the issues which it addressed, either favorable or unfavorable. Therefore, no conflict with *McKinney* is created by such a holding.

The Petitioner also attempts to support his argument with a case from the Sixth Circuit, *Moore v. Board of Education of Johnson City*, 134 F.3d 781, 785 (6th Cir. 1998). According to the Petitioner, the court in that case rejected the *Parratt* analysis because the teacher in that case was not required to plead nor prove the inadequacy of post-termination state law remedies. (Petitioner's Brief, p. 25). Though this appears to be an accurate summary of that court's ruling, that court also made it very clear that they made that ruling in "the present case", indicating it was a very fact specific determination. *Id.* In addition, that court focused its attention almost solely on the analysis in *Parratt* relating to "random" and "unauthorized" actions. *Id.* In contrast, the court in *McKinney* made absolutely no reference to such a distinction, nor did it make this a basis of its decision. Furthermore, even though the *Moore*

decision was rendered after the Eleventh Circuit's decision in *McKinney*, the *Moore* court makes absolutely no reference to *McKinney* in its ruling.

As for the authority cited from the Eighth Circuit, the Petitioner offers the lone case of *Charchenko v. City of Stillwater*, 47 F.3d 981 (8th Cir. 1995), which merely states that an aggrieved employee has two forums available to him within that circuit, state and federal relief. *Id.* at 984. That case, however, is easily distinguishable from *McKinney* and the instant case. In *Charchenko*, the issue was whether the employee's failure to pursue any administrative remedies in state court barred his claim for federal relief. *Id.* at 984. In the instant case, Gee not only failed to pursue his state remedies, but rather, also declined to exhaust the internal remedies which were available to him at the University. Therefore, since *Charchenko* did not even address the issues faced by the court in *McKinney* and the instant case, it is impossible to tell if it is in conflict with *McKinney* on these vital issues or not.

Perhaps even more telling, however, are the decisions which have been rendered from the Eighth Circuit subsequent to *Charchenko* and *McKinney*. For instance, in *Reinhart v. City of Maryland Heights*, 930 F. Supp. 410 (E.D. Mo. 1996), the Middle District Court for the Eastern District Court of Missouri relied heavily upon *McKinney* and noted that the Eleventh Circuit had recently examined "Supreme Court jurisprudence" on the issue and rendered what it considered to be controlling authority on that issue. *Id.* 412-413. *See also Friedman v. City of Overland*, 935 F. Supp. 1015 (E.D. Mo. 1996) (relying heavily upon *McKinney*, court found that plaintiff had failed to state a cause of action under § 1983 because substantive due process claim does not exist if the claim does nothing more than allege negligent conduct.)

As for the United States Court of Appeals for the District of Columbia, the Petitioner offers the case of *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997). Unlike many of the other cases offered by the Petitioner, this case actually was rendered after the decision in *McKinney*. Like all of the other

decisions, however, it again makes no reference to the holding in *McKinney* or to any of the reasoning relied upon by the Eleventh Circuit in that case.

The court in *Tri County* does make a reference to the fact that an employee pursuing a procedural due process claim need not "exhaust his local remedies." *Id.* at 462. As discussed in more detail above, however, the court in *McKinney* clearly discounted "exhaustion" as a basis for its holding, and therefore all references to this issue as a possible source of conflict are utterly misplaced. In addition, that court also mentioned that "there is a circuit split on this issue." *Id.* at 460. In making this statement, however, that court was clearly referring to the issue of whether the *Parratt* analysis applies to actions by high ranking officials acting within the scope of their authority. *Id.* This narrow issue, though perhaps sharply contested between the circuits, was not even mentioned by the Eleventh Circuit in *McKinney*. Despite Petitioner's apparent desire to confuse the issues in the instant case, this is not one of the issues to be addressed by this Court, nor was it an issue addressed by the lower court in *McKinney*.

Finally, the Petitioner offers a series of previous decisions of this Court in an attempt to undermine the credibility of the decision in *McKinney*. First, he offers *Logan v. Zimmerman Brush, Co.*, 455 U.S. 422 (1982) for the proposition that *Parratt* does not require a resort to a state remedy where the state system itself denied the property interest. In reading this Court's opinion in *Logan*, however, it becomes quite clear that the Court was not overturning its prior decision in *Parratt*, but rather was simply defining further instances which constitute "random and unauthorized" conduct. *Id.* at 435. Again, however, this distinction has no bearing on the instant case or *McKinney* because the Eleventh Circuit did not rely on such a distinction in reaching its decision in *McKinney*. In addition, *Logan* dealt with an extremely fact specific situation, namely where a state commission's actions caused an employee to miss a procedural deadline. In the present case, no such issues would apply. Therefore, this case offers little to the argument that the Eleventh Circuit's decision in *McKinney* contradicts with existing authority.

The Petitioner also offers the case of *Zinermon v. Burch*, 494 U.S. 113 (1990), to support his claim. Petitioner has offered this case for the proposition that *Parratt* is a special case in that only post-deprivation remedies are due. Even assuming, however, that this is the premise of *Zinermon*, this does not in any way conflict with the holding of *McKinney*. In fact, the Eleventh Circuit's decision in *McKinney* cites directly to *Zinermon* for the proposition that:

> A § 1983 action may be brought for a violation of procedural due process, but here the existence of state remedies is relevant in a special sense. In procedural due process claims, the deprivation by state action of a constitutionally protected interest . . . is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest without due process of law . . . *The constitutional violation actionable under § 1983 is not complete when the deprivation occurs; it is not complete unless and until the State fails to provide due process. Id.* at 126; *McKinney*, 20 F.3d at 1560.

(Emphasis supplied). Therefore, being that this basic premise is founded on the language set forth in *Zinermon*, it seems impossible to hold that the reasoning of *McKinney* conflicts with *Zinermon*.

The Petitioner contends that the holding in *McKinney* cannot be reconciled with the holding in *Loudermill*. As discussed above, the Eleventh Circuit relied heavily upon *Loudermill* and *Zinermon* in reaching its decision. This fact alone undermines the viability of Petitioner's argument of unreconciled decisions. More importantly, this Court's decision in *Zinermon* was rendered after the decision in *Loudermill*, and therefore the Court took upon itself to reconcile the concept that a violation of procedural due process is not complete until a plaintiff has availed himself of all the state remedies. Having done so, the Eleventh Circuit relied

upon this "reconciled" version of this Court's views and issued its decision in *McKinney*.

Therefore, Petitioner's claims of conflict are totally unfounded, and his petition for a writ of certiorari should be denied in its entirety for the reasons set forth above.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — LETTER FROM HAWKINS TO GEE DATED AUGUST 23, 1993

August 23, 1993

Professor Gerald Gee
744 Red Fern
Tallahassee, FL 32308

Dear Professor Gee:

As we return to work for the 1993-94 academic year, we know you share our hope that this will be a good, productive year. It must be, for the reaccreditation of the Division of Journalism depends on our working hard, together, to get the things done which we must to position ourselves not only for successful February reaccreditation but also for a successful October Board of Regents program review. That is just around the corner.

We shall all be expected to pitch in to get final preparations completed, and our work must be *quality* work.

Some faculty have been or will be assigned specific tasks for the ACEJMC self study and perhaps the BOR program review. Deadlines must be met. The ACEJMC self study is due November 1, and there must be time allowed in advance for the Dean, the Provost, and the President to read it and suggest improvements. So, deadlines will be set accordingly.

One of the biggest concerns we have is that you take very seriously the requirement to include in your *course syllabi* the contributions of women and minorities, not just African Americans, to journalism and mass communication. Dean Ruggles returned from Poynter with a lot of book and article ideas and has asked Mrs. Woody to acquire them for us, to be

placed on a special reserve shelf just for journalism faculty. They have added to that since our return.

It should go without saying that including these contributions in your syllabi is not enough. You must then bring them into your classroom lectures/discussions/demonstrations. Check Mrs. Woody on some new A-V materials which might assist.

You should also know that ACEJMC from 1994-95 onward will require units seeking accreditation to enumerate the ways they prepare their students for work in a multi-cultural society. If we can demonstrate in syllabi and courses that we are doing that now, so much the better.

Syllabi and course handouts for the fall and spring semesters will be inspected by the site visit team. They will also talk with students about what they get in class. It is up to us to see we have that base well covered.

We are optimistic about the BOR review and the reaccreditation, especially if we can get some of our equipment and other financial problems worked out. But we are not kidding ourselves; it will be mighty hard work, but it will be easier if we all cooperate and work as a team. We had that team spirit at Poynter and those of us there saw how well it worked. Let's recapture it and keep it going. It is essential.

It is our sincere hope to visit each journalism class at least once during the fall semester to try to get a sense of your teaching strengths — and weaknesses, if any. We have not been able to do that regularly, and we feel we must, if for no other reason than to steal some of your good ideas.

Appendix A

Now, a more personal word or two.

We ask that you and Professor Haskins schedule a meeting with us early in the semester so we can discuss ways to minimize potential damage to reaccreditation.

In addition, you come up for tenure this year. Unless there have been some productive activities on your part which we do not know about, we are seriously concerned about your ability to receive tenure. You should recall that Dean Ruggles has expressed concern about that in your administrative evaluations at least the last two years. We invite your attention, yet again, to the School's tenure and promotion policy statements.

We hope there is truly no cause for alarm and that you will have a productive 1993-94 year.

Sincerely,

/s/ Robert M. Ruggles
Dean

Sincerely,

/s/ James E. Hawkins, Director
Division of Journalism

APPENDIX B — MEMORANDUM FROM GEE TO HAWKINS DATED SEPTEMBER 10, 1993

Memorandum

Date: September 10, 1993

From: Gerry Gee /s/

To: James Hawkins, SJMGA Journalism Division Director
Robert Ruggles, SJMGA Dean

Subject: recent requests/assignments and on-going concerns

(This is coming to you first, Jim, but is intended for Dean Ruggles as well so I ask you to share it with him. Thank you.).

I. Resumes/Vitae for ACEJMC self-study (per 8/27/93 memo):

The dean's call for yet another revising/updating of faculty resumes is timely, given our preparations for reaccreditation, and surely applies to our new faculty members. However, I think the resume I revised and submitted last April (4/18/93) complies with the recommended format and covered most pertinent information about me. Please recall that version included these ten categories, each clearly specified:

1) Addresses
2) Experience (Academic)
3) Experience (Professional)
4) Education
5) Memberships (Professional & Honorary Organizations)
6) University Service

Appendix B

7) Public Service
8) Publications and Presentations (listing monographs, articles, professional papers, and speeches and seminars)
9) Honors, Awards & Credentials
10) Teaching Specialties

Did I miss something? Do you need more? My summer was spent mostly teaching summer school and relocating locally, so I have no new information to add to my resume — unless, of course, you want it to show new administrative assignments (see below); those, however, haven't resulted in any accomplishments yet.

I'm sure you'll tell me if the resume, I submitted last spring isn't sufficient now for ACEJMC self-study purposes. Unless I hear otherwise from you (Bob), I'll assume it is.

II. PR Sequence report assignment:

Given our need for a well-done sequence self-study report, Jim, I'm willing to help you by taking on that task now.

Your request yesterday that I accept this additional responsibility was a bit of a surprise, though, given that Prof. Haskins is currently the sequence coordinator/head *AND* that along with my normal teaching load this term *and* new duties involving retention at both division and school levels, I'm expected to submit, fairly soon, a strong application for tenure.

Nevertheless, I understand and appreciate your desire to produce good sequence reports for the self-study/reaccreditation process. Having written the previous PR Sequence reports, I know what needs to be said and how to say it. That familiarity

will be an asset, of course, but I'm sure the task still will take more time than you think — time that I had counted on for other things (i.e., my own professional future here).

You (plural now) have expressed some concern about our PR Sequence. I share those concerns. Seems to me we need:

1) more and better cooperation between the PR teachers.
2) a revitalized PRSSA chapter, and
3) greater enthusiasm and visibility by the PR students.

All that would be a *start*, a good one, and the sequence surely will be strengthened by the presence of Marilyn Kern-Foxworth next spring. But we must tackle the obvious problems now, and I want you both to know that *I* want to do that too.

I believe you should re-appoint me to serve as PR Sequence coordinator/head, at least for this reaccreditation period. Weak as it may be now, comparatively, do you not agree the Sequence was stronger when I was the head of it? Besides, it makes sense to have the senior faculty serve as heads of the four sequences, especially at this particular time. (By "senior," understand I mean those in each sequence who have been here the longest -- Keirstead, Gee, Abrams, and Grow respectively -- NOT our oldest faculty members.) If you agree and do this, however, the result is a collection of Four White Males, and the caution/ concern I raised yesterday — that some might have a problem with that — ought to be considered.

In any case, you'll have a report from/about the PR Sequence by (or before) deadline and it will be well done, not half-baked or pressure-cooked. I promise you that.

Appendix B

III. School retention concerns:

I'd like the Minutes of our 8/23 School faculty meeting to be correct. Please recall that it was I, not Arvid, who spoke of the president's concern about retention; you then asked Arvid if it was mentioned at the management meeting, Bob. Remember?

In fact, it's because I raised the subject and suggested a school committee be formed to address it that I was appointed to chair the project in the first place. That's how I recall it.

Small point, I know, but let's give credit where it's due.

(By the way, it was Gee, not Grow, who also brought up the rumor about faculty raises being reduced to fund the so-called "Super Teachers' Awards." Grow chimed in, saying he had heard the same, but Yours Truly first put the matter on the floor.

We Geralds are often confused — with each other, that is!)

Anyway, I'll try to schedule the SJMGA Retention committee's initial/organizational meeting next week and include Mr. Haskins, per your 9/3 memo requesting that. I too want "a good set of statistics" and recommendations to come from our work, and that will happen if we're able to work cooperatively AND get good cooperation from School (*and* University) support staff from whom we'll be seeking data. I may need to call on one or both of you to "grease the skids" but I hope not.

And thanks (anyway), Bob, for designating me to work with Sterlin Adams and the Academic Affairs Office as our

school's "retention data coordinator." Yes, I suppose that's logical.

IV. Tenure and Personnel Relations:

What is less logical is why I'm being given — or at least taking on — these key assignments at this critical point in my own career here. Is the gun being aimed at my foot again, STS?

Your mostly boiler-plate 8/23/93 letter came to me not at home but in an unsealed envelope in my campus/office mailbox. In any case, I was — and am — very distressed to hear that you are "seriously concerned about (my) ability to receive tenure."

You say I should recall the dean's "expressed concern about that in (my) administrative evaluations at least the last two years." I do; on those occasions, I've been reminded of my lack of any record of recent research. You also suggest I look again at the SJMGA tenure/promotion policy statements. I have, and it seems to me one needs a strong history in two of the three criterion areas (teaching, research, service) but not necessarily in all three. My woeful lack of research productivity is more than offset, then, by my record in the areas of teaching and service, a record I believe to be substantially better than most on our faculty. Could I be wrong about this? If so, you haven't said so in or beyond the context of those administrative evaluations.

Admittedly, my general productivity slipped a bit in the past three years, no doubt related to the deterioration of my marriage (ultimately ending, after 23 years, in what has turned out to be a less-than-amicable divorce) and, a year later, my

mother's death (from causes related to her alcohol addiction). Still, I would pit my record of teaching and service, going back to when I joined the faculty here in 1977, against that of any other member of our faculty. Or would that be a mistake?

I was persuaded once to withdraw my initial application for tenure, and I now know that was a mistake. I was led to believe my first application would not be approved (by then-President Walter Smith) because I lacked the terminal degree. Subsequently, the rules changed, of course, and others on our faculty without that degree have received tenure and/or promotions since 1982 while I languished for many years outside the "tenure-stream."

In fact, a close examination of practices here would reveal at least one instance of a faculty member being tenured and promoted to full professor without the (newer) requisite qualifications and another being granted tenure without application review by the school's tenure/promotion committee. Moreover, at least one faculty member received tenure after being given, in the application process, various kinds of administrative support — support which, to date, I have yet to be offered in any form.

Rather than encouragement in and support for this process, what I seem to be getting from you is yet another "you're not doing enough" whack-on-the-hands warning. That's discouraging.

The most recent (but perhaps not final) example of that discouragement is the request (requirement?) In your 8/23 letter to schedule a meeting with you and Mr. Haskins soon "so we can discuss ways to minimize potential damage to

reaccreditation." WHO, pray tell, is supposed to call this meeting? WHAT is this oblique reference to "potential damage" and WHY, after Poynter, am I being put on record as being associated with something so nebulous and negative? If you have some problem with me, please be clear about it. A slur, however vague and veiled, is still a slur, and I don't appreciate it, in print or in person.

I once sat in your office, Jim, and listened to Mr. Haskins express "absolutely no respect" for my professional experience and teaching. Remember that? Well, despite such dogmatic damnation, I'm still willing to do whatever I can to heal this rift between us — assuming it's something that can be healed at all. Yet a closed mind, however cordial on certain occasions, is still a closed mind, and there's only so much *I* can do.

So, gentlemen, what are the next steps?

APPENDIX C — MEMORANDUM FROM GEE TO RUGGLES DATED SEPTEMBER 20, 1993

Memorandum

TO: Dean Ruggles *FROM*: Gerry Gee

RE: resume request(s) *DATE*: 09-20-93

Does the right hand know what the left hand is doing?

That I was among those to whom you addressed your 9/15 memo calling, again, for revised/updated resumes indicates you had not seen a 9/10 memo I wrote to you and Dr. Hawkins and gave to him to share with you.

If you had seen it, you would have known that (1) a version of my resume, revised and submitted earlier (4/18/93), is already on file and covers (I think) all of the essential categories you want included now, and (2) I'd be willing to do another if that earlier one is not sufficient.

My 9/10 memo addressed other concerns too, but I'll not get into those here; your 9/15 memo is enough to deal with now.

For the record, I spoke with Mrs. Travis several times last week to make sure my resume — the 4/93 revision — was on file in your office. At first, I was told that it wasn't — that those you asked us for back then were in Dr. Workman's hands (for whatever reason); later, in another conversation, Mrs. T. Said she did, in fact, have (that version of) my resume. As far as I knew, then, there was not need to do another.

But along comes your 9/15 memo implying, flat-out, a lack of cooperation on my part (and others). I resent that, Bob.

Appendix C

Last week I also checked with Dr. Hawkins to make sure he had gotten my 9/10 memo. He said he had and would "get back to (me)" about it. As of last Friday (9/17) he had not done so.

Well, I hope you see, if you haven't already, what's been on my mind lately; the 9/10 memo spells it out quite clearly. Meanwhile, here's a revised Page 1 of my resume showing my new home address. Add this to what you got from me last April and my resume will then be accurate and, I believe, sufficient for your purposes at this point.

/s/
Gerry

APPENDIX D — LETTER FROM MEMBERS OF THE CLASS TO HAWKINS DATED SEPTEMBER 22, 1993

September 22, 1993

Dear Professor Hawkins:

In a class discussion on 09/20/93 in PUR 4001, Professor Gerald Gee made an unacceptable comment in relation to our concern about the lack of public relations outlets for students on campus. He said that waiting around for someone to give us these outlets created a "nigger mentality," one which will keep us sitting on the back of the bus forever. We feel his comment was derogatory, unethical and most importantly, inappropriate. There are many other terms he could have chosen to convey this message, and as a journalism professor, we are sure he was aware of this.

In a day and age where racial tension is on the rise, and multi-culturalism is taught in the University, we find Professor Gee's use of terms to be especially detrimental to his relationship with many students in our class. To say the least, we are appalled and outraged that he could stand in front of our class and so blatantly disregard the fact that we as African-Americans are extremely sensitive to the use of racially derogatory terms of any kind. We find his action, in any context, not only racially charged, but extremely unprofessional.

To make a statement of this nature, we are more than concerned about how his attitude will affect his position at an historically black university. The words of Professor Gee were unappreciated and most certainly will not be tolerated. We demand the administration to respond accordingly.

Sincerely,

/s/ Lisa G. Atkinson
/s/ Derik G. Austin
/s/ Marlon Flanigan
/s/ Chamane Kennedy
/s/ Tisha Rumph
/s/ Angela Ellis

cc: Dean Robert Ruggles
Dr. Richard Hogg
Leo Sam
Dr. Frederick Humphries
Prof. James Haskins

APPENDIX E — MEMORANDUM FROM GEE TO HAWKINS DATED SEPTEMBER 24, 1993

(SEAL)

Tallahassee, Florida

MEMORANDUM

Date: September 24, 1993

From: Gerald Gee

To: Dr. James E. Hawkins, journalism division director

Subject: concerns about my teaching

Yesterday, at about 9 a.m., you called my home and left a message indicating there was a matter you wanted to discuss with me in your office "as soon as possible." I called you about an hour later and learned then that this was about a letter you had received from some students in my Public Relations Case Studies class, a letter in which they voiced their objections to a remark I had made in class last Monday night.

You asked, in that conversation, for an explanation and I gave you my account of what I recalled saying and why: in short, I tried to put my objectionable remark in context, just as I had done at the time it was first made. My explanation was neither understood nor well received (on both occasions), and I came to your office to see you so we could discuss the matter further.

When I arrived, at 11:12 a.m., you were speaking with someone, so, after waiting a few minutes, I left to chair a

previously called 11:15 meeting of the School Retention Committee. I came back after that and at 12:40 p.m. you gave me an unsigned copy of the students' letter of concern. We then sat in your office and discussed it, during which time you handed me your 9/23 memo which had been prepared prior to my arrival.

I want you to know (again) that I understand our students' objections to the remark I made. Indeed, I anticipated adverse reaction to it before I even said it Monday night and so tried — before, during and after saying it — to put it into context. Sadly, some chose to focus on one word (or phrase) and, therefore, to not hear the point I was trying to make. Others did, however, and I presume that is why their signatures are not affixed to the letter you received. In any case, I have done as you suggested and prepared the enclosed written apology to be read to the whole class when it meets again Monday night (9/27).

It is my fervent hope that my apology will mollify the students and that no further action on this will be necessary.

For the record, I am greatly distressed myself not only about this situation's content (the remark and the uproar it has caused) but also about the manner in which it is being handled.

The students voiced their complaints directly to you, in writing, with copies to several University officials and to another teacher. I was neither sent nor given that letter by the students, so it's clear they meant to formally bring their concern to others but not to me. I believe we have a policy, or at least a widely-known practice, that students who feel something is wrong should attempt to work that out with their teacher(s) before taking it "up the line." That did not happen in this instance;

instead, others were made aware while I was not. Moreover, where the policy/practice calls for a stepwise progression through several levels of university administration, these students chose to publish their complaints simultaneously to four different officials — and, for whatever reason, to a another teacher. Granted, the policy/practice referred to here is for pursuing formal grievances, it is still something used for more general problematic situations as well. But not this time.

You told me the letter was signed by seven students and that an eighth name was included "but in parentheses." Yet you refused my request to see who signed it or to otherwise know just who has complained so I could direct an apology particularly to them. Some apparently understood what I was trying to say Monday night, or at least they were not given (or chose not to take) the opportunity to add their names to the letter. You expect me to apologize to a whole class for what only some are upset about; fine, I'll do that. But this whole thing resembles more a "star chamber" conviction, complete with (to me anyway) anonymous accusers, than an opportunity to address, forthrightly and openly, certain individual and collective concerns. I've had such experiences before but I never thought I'd get that treatment *here*. It seems I was wrong to expect better from this University.

Again, I was aware at the time that my choice of words was going to shock and even offend some. I warned about that before making the remark. I repeatedly said that my comment was *not* directed at anyone in particular, nor was it to be understood as a condemnation of the class in general. And I apologized for it afterwards, at least once, to the whole class (in attendance).

Appendix E

While I would like a chance to direct yet another apology specifically to the students who were disturbed enough to write the letter, I am being denied that opportunity. Why? Apparently because you feel I might take some retributive action against them. It especially saddens me that you would think that, Jim, after working with you for 16 years. Do we not know each other anymore? Have we been so wrong about each other all these years?

Listed below are the students enrolled in PUR 4001-001 (Public Relations Case Studies) according to the Registrar's Office 9/3 and 9/17 — Preliminary Rolls (the latter received on Thursday, 9/23). Class attendance last Monday (9/20) is also shown.

#/name:	*on rolls:*	*9/03*	*9/17*	*present on 9/20:*
1. ATKINSON, Lisa		Y	Y	Y
2. AUSTIN, Derek		Y	Y	Y
3. CLARK, Changalar		Y	Y	Y
4. COLE, James		N*	N*	N
5. DANIELS, Charie		Y	Y	N
6. DAVIS, Nikki		Y	Y	Y
7. FLANIGAN, Marlon		Y	Y	Y (but left early)
8. GREGORY, Dwanna		Y	Y	Y
9. GRIFFIN, Tia		Y	Y	Y
10. KENNEDY, Chamane		Y	N	Y
11. KING, Doran		Y	Y	N
12. McKINNIE, Selena		Y	Y	Y
13. McPHERSON, Dana		Y	Y	Y
14. MILLER, Alvina		Y	Y	Y
15. PORTER, Curtis		Y	Y	Y

Appendix E

16. RUMPH, Tisha	Y	N	Y
17. TUCKER, Tamara	Y	Y	Y
18. WILLIAMS, Vecelia	Y	Y	N
			(excused for illness)

*James Cole attended one class session and told me he was trying to get in the course, but I never saw him after that.

Seven of the 14 students who were in class Monday night put their signatures to a letter and then added the name of another, perhaps to create a majority expression. But I quite agree with you: if even *one* student is so upset by something in a classroom, there is a need to solve the problem and rectify the situation.

Your memo yesterday said you were "willing to discuss this matter (of my remark and the reactions to it) at the earliest opportunity." I wish you had been so "willing" to discuss the issues and concerns cited in my earlier (9/10) memo to you, Jim. It has been fully two weeks since you got that — with my request that you share it with Dean Ruggles — and, other than an "I'll get back to you on it," I've not heard *anything* from you about what I raised there. Worse, perhaps, I learned from a telephone conversation with him late yesterday that Dean Ruggles still has not seen that memo — despite my calling his attention to it in a separate memo last Monday. *Now* you are "willing" to communicate with me about something that concerns us both (and others surely), but *when* were we going to deal with what I raised earlier?

Your memo says you're sure I "know the value of having a classroom climate where the students realize a sense of encouragement, concern and effective direction." Indeed I do, Jim.

Appendix E

What I wonder now, though, is whether you yourself know the value of an administrative climate where the *teachers* experience "a sense of encouragement, concern and effective direction." And if I must ask myself that about *you*, I must ask it about others here as well. But it's not my job to question (or second-guess) how or why some folks do what they do. My job is to *teach*.

The record will show that I've done what I could to be a good (and sometimes even great) teacher here. It's clear that my work in teaching and service, two of the three areas in which faculty are expected to excel, is commendable, even if I've not gotten much public reward or recognition for it. Nevertheless, my potential for continued success in those endeavors here is seriously undermined now by what some few people may think, by perceptions and misunderstanding. I feel minds — and mouths — closing all round us here, a certain skittishness about the possibility of saying something that might offend. That sort of "political correctness" will, I believe, be the death of free expression. I'm sorry to see it happening even/especially here.

In your 8/23 letter to me, you and Dean Ruggles said you were "seriously concerned about (my) ability to receive tenure." I tried to address that in my 9/10 memo but thusfar have gotten no response from either of you. Now, because of *this* incident, I have come to share your doubts about my getting tenure here.

I believe there is, in addition to my public apology to the students, one thing that can be done that will put this matter to rest, firmly and finally, to the satisfaction of some parties. Under the circumstances, I can see no great good coming from my continuing to teach at Florida A&M University. Therefore, for reasons both professional and personal, I hereby resign from my post(s) here, effective at 5:00 p.m. today.

Appendix E

My office will be cleared out over the weekend, and I'll work with you on making an orderly transition for a replacement teacher in my courses. I ask only that you read my enclosed statement to the students in PUR 4001 this Monday night (9/27).

For you help you have been to me at times along the way, I thank you.

encl.

c. Mr. Robert M. Ruggles, SJMGA dean
Dr. Richard A. Hogg, vice president of academic affairs
Dr. Frederick S. Humphries, president
Mr. Leo P. Sam, Jr., vice president of university relations

APPENDIX F — MEMORANDUM FROM GEE TO RUGGLES DATED SEPTEMBER 24, 1993

MEMORANDUM

TO: SJMGA Dean Robert M. Ruggles

FROM: Gerald M. Gee

RE: response to 09/23 memo and call

DATE: 09-24-93

The memo Dr. Hawkins gave me yesterday regarding the "Letter from Students in your Case Studies Class" and your phone call later in the day, in which you informed me you were placing a "letter of reprimand" in my file, were the proverbial straws.

You have broken this camel's back, Bob.

Please ready over the enclosed copies of my response memo to Dr. Hawkins AND the earlier (09/10) memo which you apparently never saw or heard about from him. They begin to tell the story.

Bottom line, though, is this: I'm quitting. I believe my effectiveness as a teacher here has been severely undermined by this latest misunderstanding, the most recent in a series of instances in which I've felt very badly treated by some students and certain other teachers. You know what I mean, I'm sure.

There's no way now to go back and "set the record straight" one experience after another all points the same way: I've outlived my usefulness here. It's time to put this all behind me.

Strange company I'm in: John Hanson, Frank Johnson, Max Shively and others who put a thorn in your side (or a bur

in your saddle) more often than not. And now me. And, like them, I'm leaving FAMU with more gall than gratitude at this point.

(You once said, when John Hanson went from here to teach at Temple U., that Temple "would chew him up and spit him out." Remember that? Is that what happened to me here at Florida A&M?)

The timing is right. Marilyn Kern-Foxworth will be here in the spring; this gives you some time to pull together enough incentive to persuade her to stay and fill the open line position. We do need her here; you don't need me under these circumstances.

As you see, I've asked Dr. Hawkins to read my apology/ statement (enclosed) to the students in Case Studies Monday night. I suspect that whatever concern my leaving causes, it will pass soon and will be much less than what would be if I stayed now. On the other hand, I can think of a few who might actually be prone to celebrate my departure — and I bet they will.

Nothing more to say, in writing or otherwise. In an earlier time, when my hair was short, you probably regarded me as playing "Lt. Fuzz" to your "Gen. Halftrack." Well, I can say now I'm beginning to know that Ollie North has felt like (though I still can't stand his politics), and it truly is a STRANGE feeling.

/s/
Gerry

APPENDIX G — MEMORANDUM FROM GEE TO ALL STUDENTS IN PUR 4001-001 DATED SEPTEMBER 24, 1993

MEMORANDUM

(*To be read to all students in PUR 4001-001 on Monday, 09-27-93.*)

FROM: Gerry Gee DATE: 09-24-93

RE: last week's class

Following a remark I made in class last week, some of you wrote a letter to Dr. Hawkins and provided copies to several others — though not to me. Apparently, the letter was signed by seven (or eight) or you; Dr. Hawkins shared the letter with me but fully protected you from any potential or retribution for it.

That letter, and events before and after it, prompted my resignation from Florida A&M University last Friday (9/24). My last request of Dr. Hawkins was that he read this statement to you tonight since I am no longer an employee of FAMU.

Now about what I said last week: I'm sorry. I tried to prepare you at the time for what I was about to say, tried to explain that it was not directed at anyone in particular (or even at all of you as a class), and I apologized to you afterwards for saying it. I would hope that at least some of you remember that.

In truth, I'm *very* sorry about what I said last week because, in making that remark, I *fundamentally* misjudged my audience — always a grievous mistake in Public Relations. I had thought you were capable of hearing beyond words — even that one — and capable of understanding my concern for you. I was wrong.

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You might not think so, but I *did* learn a lot during my 16+ years of teaching here. I'm better for having had this experience, and I believe my former students are better for it too. Some of them anyway. Another PR lesson: You can't please all the people all of the time, but you *must* be honest with yourself.

I'm sorry also that we won't be able to finish this terms together, that I won't be here to see you graduate and that what you'll remember from all this is *this* and not whatever I taught you up to this point. But I wish you all well in any case.

You and I know there will be lots of rumors and TALK about my sudden departure in the wake of what I said last week. If you must add to that, please contribute *facts* and not gossip. Remember: You (most of you) were the "eyewitnesses" so you KNOW *what* happened. Some of you may even know *why* it happened.

You put your signatures to a letter in which you accused me of being (among other things) "unprofessional." Thus, I have chosen to no longer "profess" here. I'm leaving teaching.

Please continue to read widely, proofread carefully, learn all you can and apply your knowledge wisely. Good luck to you.

APPENDIX H — MEMORANDUM FROM GEE TO HAWKINS AND RUGGLES DATED SEPTEMBER 27, 1993

MEMORANDUM

Date: 09-27-93

From: Gerald M. Gee

To: James E. Hawkins, SJMGA Journalism Division Director
Robert M. Ruggles, SJMGA Dean

Subject: follow-up to Friday's meeting

I thank both of you for meeting with me last Friday at 4 p.m. to discuss the problem of my unfortunate use of certain words in the Public Relations Case Studies (PUR 4001) class on Monday, 09-20-93.

You both no doubt were focused on *that* problem as the dilemma-at-hand and were thinking of ways to resolve *it* when I gave you my 09-24 memo referencing earlier concerns (see 09-10 memo) and saying that, in the face of it all, I had decided to resign from teaching at Florida A&M University.

That was how our 4 p.m. meeting began: with my decision, which I presented as *my* solution to several problematic concerns.

To recap, now, some of the major points of that meeting . . .

1) Dr. Hawkins, you asked if I really meant this (what was said in my 09-24 memo); I replied that I did.

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2) Dean Ruggles, you said you thought this was "a bit extreme"; I said I didn't think so under the circumstance — that I saw this as a way of resolving several dilemmas at once: the students' concerns about my use of a term in the Case Studies class; a longstanding (and seemingly unresolvable) personality clash with another faculty member (Mr. James Haskins); the matter of my coming up for tenure (again) this year and feeling (a) no sincere administrative support for that and (b) that this incident (prompted by the students' copying their letter to the highest levels of administration) would prejudice any application I might make for tenure. Neither you nor Dr. Hawkins took that moment to address those concerns one-by-one; instead, you both expressed, again, your feeling that my decision was "extreme."

3) I told you that, simply put, I wasn't enjoying what I was doing here anymore, that I had lost the energy and enthusiasm I once had and so felt I am no longer the teacher you need for our (Public Relations) students, and that my decision was based on all that and more.

4) I said I believed my leaving now would make it easier on all concerned. You both said you didn't think so, and you, Dean, inquired about my health — if this was a physical or mental problem. I said I didn't think so. You asked if I had talked about the stresses of work with a psychologist, and I said I had not.

5) Addressing some particular points of my 09-24 memo, Dr. Hawkins reiterated his rationale for not divulging the names of the students who had signed the 09-22 letter of complaint, to which I said simply, "that's

okay." You also reminded me that you *did* act on one point raised in my 09-10 memo, namely, my suggestion that a change be made in the heading of the Public Relations Sequence. (That action, by the way, came in the form or your 09-20 memo to me and Mr. Haskins, six working days after I had discussed it in my earlier memo — which, itself, was an immediate follow-up to our previous day's telephone conversation in which you said, among other things, that you were "thinking of making a change in the PR Sequence Head" post.)

6) You both agreed that my prepared statement/apology was well written and acceptable (at least to you).

7) Finally, after much discussion, you both asked me to delay cleaning out my office and to take the weekend to think about my decision and to meet with both of you on Monday (today) before doing anything else. I agreed to meet again but said I would begin to clear my office (we joked that it needed a good cleaning anyway) and that I wasn't planning to meet my classes on Monday. Dr. Hawkins agreed to read my statement/ apology to the students in Case Studies Monday night.

Subsequently, with the help of Dr. Abrams, I began cleaning out my office over the weekend. (I had not discussed my decision with anyone other than yourselves, and reluctantly disclosed it to Mike only after we met you at the elevator Sunday evening and he commented to me about how depressed you seemed, Jim.) As you have seen, some of my papers, etc. have been removed but much still remains. I'd like to finish that process this week.

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Also, in a phone conversation prior to my first scheduled class, you (Jim) asked if my decision stood and if I was "going forth with the letter." I told you that, in fact, I had thought about it this weekend but could not bring myself to any change in the decision at that point. I said also that, before doing anything else, I would meet with you and Dean Ruggles at some time today convenient to us all. You suggested a 3 p.m. meeting, and I agreed to see you both at that time.

I must tell you I feel awful about this. To think that my 15+ years of teaching here has come down to this . . . well, it's tragic, both personally and professionally. It isn't what I'd like but it is something I feel I must do.

Jim, you mentioned in our Friday meeting that perhaps I was making a "martyr" of myself. But for what? No, I'm *not* martyring myself by doing this; people — both the good and the not-so — leave their jobs when they feel they must (though some of the not-so-good find ways of staying on past their prime — and at FAMU, as elsewhere I suspect, the academic process of tenure is compromised enough by politics to allow that to happen).

Were I *not* to leave now, what assurances are there that my application (again) for tenure here would be objectively reviewed and considered without bias of any kind, as indeed it should be?

I do not see how, given the major important responsibilities I've been asked (and had agreed) to assume recently pertaining to retention and reaccreditation, I can assemble an application for tenure strong enough to overcome any lingering prejudices and those now arising from this latest incident. Thus, as I see

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it, my days at FAMU are numbered anyway, so it makes more sense to leave now voluntarily than to be "cut loose" later.

No, I'm certainly not a martyr here. Just greatly overworked. And as I said Friday, some can continue on that basis but I cannot. You need a "fresh" teacher here, and I'm sure our students would better appreciate one who is younger, black and female. Marilyn Kern-Foxworth will be more to their liking.

Let me be clear about this: I'm not leaving to take a better job somewhere else. I have no offers, nor have I been seeking any. My hope was to someday *retire* from Florida A&M, not resign from this great University. No, if anything, I'm doing what I feel I must do now to preserve my physical and mental well-being.

This is, in a way, putting myself on medical leave, but permanently. I just wish I didn't have to severe my ties to — and employment by — the University to accomplish that what is needed now.

University officials may want to bring action (e.g., a breach-of-contract suit) against me, but I don't wish to see any such dispute made public or met with formal counter claims. The extent to which this may get "messy" is up to you — and them.

Finally, let me say, as I did last Friday, that I'm resigning because I see no other way of resolving the new and not-so new dilemmas attendant to my continued presence here. However, if you two — or others — see some other solution, I'd be more than happy to hear and consider it at this time.

/s/ Gerry